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30 Mississippi Public Employees' Retirement
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32 UNITED STATES DISTRICT COURT
33
34 NORTHERN DISTRICT OF CALIFORNIA
35
36 SAN FRANCISCO DIVISION

37 JORGE SALHUANA, Individually and on
38 behalf of all others similarly situated,

39 Case No.: 11-cv-05386-WHA

40 Plaintiff,

41
42 NOTICE OF MOTION AND MOTION OF THE
43 MISSISSIPPI PUBLIC EMPLOYEES'
44 RETIREMENT SYSTEM FOR
45 CONSOLIDATION AND APPOINTMENT OF
46 LEAD PLAINTIFF; MEMORANDUM OF
47 POINTS AND AUTHORITIES IN SUPPORT
48 THEREOF

49 v.
50 DIAMOND FOODS, INC., MICHAEL J.
51 MENDES, and STEVEN M. NEIL,

52 Defendants.
53
54 Date: February 23, 2012
55 Time: 2:00 p.m.
56 Courtroom: 8, 19th Floor
57 Judge: Hon. William H. Alsup

58
59 (caption continued on following page)

1 RICHARD MITCHEM, Individually and
2 on behalf of all others similarly situated,
3 Plaintiff,

Case No.: 11-cv-05399-WHA

4 v.
5 DIAMOND FOODS, INC., MICHAEL J.
6 MENDES, and STEVEN M. NEIL,
7 Defendants.

8 STEWART WOODWARD, Individually
9 and on behalf of all others similarly
10 situated,
11 Plaintiff,

Case No.: 11-cv-05409-WHA

12 v.
13 DIAMOND FOODS, INC., MICHAEL J.
14 MENDES, and STEVEN M. NEIL,
15 Defendants.

16 GARY RALL and MARION RALL, On
17 behalf of themselves and all others
18 similarly situated,
19 Plaintiffs,

Case No.: 11-cv-05457-WHA

20 v.
21 DIAMOND FOODS, INC., MICHAEL J.
22 MENDES, and STEVEN M. NEIL,
23 Defendants.

24 GARY SIMON, Individually and on behalf
25 of all others similarly situated,
26 Plaintiff,

Case No.: 11-cv-05479-WHA

27 v.
28 DIAMOND FOODS, INC., MICHAEL J.
29 MENDES, and STEVEN M. NEIL,
30 Defendants.

1 HENRY J. MACFARLAND, Individually
2 and on behalf of all others similarly
situated,

Case No.: 11-cv-05615-WHA

3 Plaintiff,

4 v.

5 DIAMOND FOODS, INC., MICHAEL J.
6 MENDES, and STEVEN M. NEIL,

7 Defendants.

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NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

PLEASE TAKE NOTICE that on February 23, 2012 at 2:00 p.m., or as soon

thereafter as the matter may be heard, in the Courtroom of the Honorable William H.

Alsup, United States District Court, Northern District of California, San Francisco

Division, 450 Golden Gate Avenue, San Francisco, California 94102, the Mississippi

Public Employees' Retirement System ("Mississippi PERS" or "Movant") will, and

hereby does, move this Court pursuant to § 21D(a)(3)(B) of the Securities Exchange Act

of 1934 (“Exchange Act”), 15 U.S.C. § 78u-4(a)(3)(B), for an order (1) consolidating the

above-captioned related actions pursuant to Fed. R. Civ. P. 42(a)¹ and (2) appointing

Mississippi PERS as Lead Plaintiff to represent all those who purchased or otherwise

acquired Diamond Food Inc. securities during the Class Period pursuant to the Private

Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4.²

This motion is made on the grounds that Mississippi PERS is the “most adequate

plaintiff" pursuant to the Exchange Act. *See* 15 U.S.C. § 78u-4(a)(3)(B). In addition,

Mississippi PERS meets the requirements of Federal Rule of Civil Procedure 23(a)

because its claims are typical of other Class members' claims and because it will fairly

¹ On January 3, 2012, this Court issued an Order to Show Cause why the six above-captioned cases should not be consolidated under Rule 42(a) of the Federal Rules of Civil Procedure. *See Docket No. 18.* For the reasons discussed below, Mississippi PERS agrees that the above-captioned cases should be consolidated and does not object to the Court's January 3, 2012 order.

² Pursuant to this Court’s January 5, 2012 Order (See Docket No. 22), Mississippi PERS is deferring its application to appoint its counsel Chitwood Harley Harnes LLP (“Chitwood”) and Grant & Eisenhofer P.A. (“G&E”) as co-lead counsel for the class of all those who purchased or otherwise acquired Diamond Food Inc. securities during the Class Period. At the appropriate time as directed by the Court, Mississippi PERS will move for an order approving Mississippi PERS’ selection of Chitwood Harley Harnes LLP and Grant & Eisenhofer P.A. as Co-Lead Counsel and Lieff Cabraser Heimann & Bernstein, LLP (“Lieff Cabraser”) as Local Counsel.

1 and adequately represent the class.

2 This Notice of Motion and Motion is based upon the Memorandum of Points and
 3 Authorities in support thereof, the Declaration of James M. Wilson, Jr., the pleadings and
 4 files herein, and such other written or oral argument as may be presented to the Court. A
 5 Proposed Order is also submitted herewith.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 Movant the Mississippi Public Employees' Retirement System ("Mississippi
 8 PERS" or "Movant") respectfully submits this Memorandum of Points and Authorities in
 9 Support of the Motion of the Mississippi Public Employees Retirement System for
 10 Consolidation and Appointment as Lead Plaintiff. Mississippi PERS is responsible for the
 11 management of pension assets in excess of \$17.2 billion for approximately 295,000 of
 12 Mississippi's current and retired employees.

13 **I. STATEMENT OF ISSUES**

14 Presently pending in this District are at least six related securities fraud class
 15 action lawsuits (the "Related Actions")³ filed against Diamond Foods, Inc. ("Diamond" or
 16 the "Company") and certain of its officers (collectively hereinafter "Defendants") on
 17 behalf of the purchasers of Diamond securities during the period December 9, 2010
 18 through November 4, 2011, inclusive (the "Class Period").⁴ Each action alleges violations

22 ³ Movant is filing identical lead plaintiff papers in each of the six above-captioned cases
 23 using the first-filed case number, 11-cv-05386-WHA. Pursuant to the Related Case Order
 24 dated December 21, 2011, all six actions, as well as the derivative action *Board of
 25 Trustees of City of Hialeah Employees' Retirement System v. Mendes*, 11-cv-05692-WHA,
 26 are deemed related and assigned to the Honorable Judge William Alsup. An additional
 27 derivative action, *Lucia v. Baer*, 11-cv-06417-JSC, was filed on December 19, 2011. A
 28 stipulation and motion to relate the *Lucia* case was filed on January 6, 2012.

⁴ December 9, 2010 through November 4, 2011, inclusive, is the longest class period
 27 alleged in a complaint against Diamond. *See Mitchem v. Diamond Foods, Inc.*, 11-cv-
 28 05399-WHA; *Simon v. Diamond Foods, Inc.*, 11-cv-05479-WHA; *MacFarland v.
 29 Diamond Foods, Inc.*, 11-05615-WHA. While other complaints allege class periods of
 April 5, 2011 through November 1, 2011, the longest class period alleged is used for the

Footnote continued on next page

1 of the federal securities laws under Sections 10(b) and 20(a) of the Exchange Act, 15
 2 U.S.C. §§ 78j(b) and 78t(a), and SEC Rule 10b-5 promulgated under Section 10(b), 17
 3 C.F.R. § 240.10b-5.

4 Mississippi PERS first seeks to consolidate these Related Actions pursuant to Rule
 5 42(a) of the Federal Rules of Civil Procedure. Under the PSLRA, prior to selecting a lead
 6 plaintiff, the Court must decide whether to consolidate the Related Actions. *See* 15 U.S.C.
 7 § 78u-4(a)(3)(B)(ii). On January 3, 2012, this Court issued an Order to Show Cause why
 8 the six above-captioned cases should not be consolidated under Rule 42(a) of the Federal
 9 Rules of Civil Procedure. *See* Docket No. 18. Mississippi PERS agrees that the above-
 10 captioned cases should be consolidated. Each action asserts substantially the same claims
 11 against the same defendants and raises substantially the same questions of law and fact.
 12 Also, each of these cases alleges violations of Sections 10(b) and 20(a) of the Exchange
 13 Act. Thus, all of the prerequisites for consolidation under Rule 42(a) are present.⁵

14 As soon as practicable after a decision on consolidation has been rendered, this
 15 Court must appoint “the most adequate plaintiff as lead plaintiff.” 15 U.S.C. § 78u-
 16 4(a)(3)(B)(ii). In that regard, the Court is required to determine which movant has the
 17 “largest financial interest” in the relief sought by the Class in this litigation and also make
 18 a *prima facie* showing that it is an adequate class representative under Rule 23 of the
 19

20
 21
 22 *Footnote continued from previous page*

23 purpose of the lead plaintiff motion “unless the allegations supporting it are obviously
 24 frivolous.” *In re BP, PLC Sec. Litig.*, 758 F. Supp. 2d 428, 436 (S.D. Tex. 2010)
 25 (utilizing longest class period for purposes of lead plaintiff motions); *see also Eichenholtz*
v. Verifone Holdings, Inc., No. C 07-06140, 2008 WL 3925289, at *2 (N.D. Cal. Aug. 22,
 26 2008) (using longer class period for purposes of appointing lead plaintiff); *Plumbers &*
Pipefitters Local 562 Pension Fund v. MGIC Corp., 256 F.R.D. 620, 625 (E.D. Wis.
 27 2009) (“nothing in the PSLRA limits the class period to the period identified in the first
 28 notice”).

29 ⁵ Mississippi PERS does not seek to have the pending derivative claims consolidated with
 30 the securities cases brought pursuant to the Exchange Act because of the different nature
 31 of the derivative claims.

1 Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

2 Mississippi PERS believes that it is the “most adequate plaintiff” as defined by the
 3 PSLRA and should be appointed Lead Plaintiff for this action to represent all persons who
 4 purchased or otherwise acquired the securities of Diamond during the Class Period.⁶
 5 Specifically, Mississippi PERS suffered approximately \$1,819,454 million⁷ in losses as a
 6 result of its purchases of shares of Diamond.⁸ Movant Mississippi PERS is a
 7 sophisticated institutional investor, experienced in conducting and supervising counsel in
 8 complex securities litigation and therefore is the paradigmatic lead plaintiff under the
 9 PSLRA. Accordingly, Mississippi PERS respectfully submits that it should be appointed
 10 Lead Plaintiff.

12 **II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

14 Diamond is a packaged food company specializing in marketing nuts, particularly
 15 walnuts, as well as manufacturing and distributing snack foods such as Kettle Brand
 16 potato chips, Emerald nuts, and Pop Secret Popcorn. Diamond’s products are distributed
 17 globally. Plaintiffs in the Related Actions allege that during the Class Period: (1) the
 18 Defendants overstated the Company’s earnings by improperly accounting for certain crop
 19 payments to walnut growers; (2) failed to disclose that the Company’s acquisition of

21 ⁶ Mississippi PERS will be filing additional information in support of its motion to be
 22 appointed lead plaintiff in its responses to the Court’s Questionnaire To Lead Plaintiff
 23 Candidates, on or before the February 9, 2012 deadline set by the Court. (See Docket No.
 22-1).

24 ⁷ Mississippi PERS’ total LIFO and FIFO losses are both \$1,819,454. LIFO and FIFO are
 25 defined below. As of the time of preparing this document for filing, Mississippi PERS is
 26 aware of no other movant with equal or greater losses, and therefore as of this time, to its
 27 knowledge, it is the presumptive lead plaintiff.

28 ⁸ A copy of the Certification of Mississippi PERS is attached as Exhibit A to the
 29 Declaration of James M. Wilson, Jr. (“Wilson Decl.”), filed herewith. As required by the
 30 PSLRA, this Certification sets forth the transactions of Mississippi PERS in Diamond
 31 securities during the Class Period. In addition, a chart reflecting the calculation of
 32 Mississippi PERS’ financial losses on Diamond securities is attached as Exhibit B to the
 33 Wilson Declaration.

1 Proctor & Gamble's Pringles snack business would be delayed; (3) Diamond lacked
2 adequate internal and financial controls; and (4) as a result of the foregoing, Diamond's
3 financial results were materially false and misleading.

4 Diamond began as a cooperative company selling walnuts grown in California. In
5 2005, Diamond converted to a publicly traded company, and over the next several years,
6 greatly expanded its business by acquiring other snack food companies. As part of its
7 expansion strategy, Diamond announced the acquisition of the Pringles potato chip
8 company from Proctor and Gamble ("P&G") in April 2011. The acquisition was to be
9 completed via a stock swap whereby the shareholders of P&G would receive 29.1 million
10 shares of Diamond common stock. As part of the deal, Diamond agreed to assume \$850
11 million of Pringles' debt, with a collar mechanism that would adjust the amount of
12 assumed debt based on the average of Diamond's stock price during a 5-day trading
13 period prior to the close of the transaction. Consequently, the amount of debt to be
14 assumed by Diamond could increase by up to \$200 million or decrease by up to \$150
15 million depending how much Diamond's share price was above or below \$51.47.

16 Prior to the April 2011 announcement of the Pringles deal, Diamond shares were
17 trading between \$45 and \$55. As the acquisition moved ahead, Diamond stock quickly
18 grew to the high \$60 range and into the \$70 range for most of the summer of 2011. On
19 September 15, 2011, Diamond announced its fourth quarter earnings, a surprising 27%
20 increase, and the stock shot up to \$87.30, ultimately reaching its all-time high of \$92.

21 Diamond increased its reported income and earnings by improperly accounting for
22 its purchase of walnuts from growers during the Class Period. Diamond contracts with
23 walnut growers to acquire a grower's entire crop each fall. Diamond then determines the
24 final price to be paid after delivery (but prior to the end of Diamond's fiscal year on July
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1 31) based on market conditions. Because Diamond commits to purchasing a grower's
2 entire crop, it typically pays slightly higher than market price in years of weak demand,
3 and slightly lower than market price in years of strong demand. The crop harvested in the
4 fall of 2010 had a strong demand. Diamond established and booked the payments for the
5 Fall 2010 crop at the end of its Fiscal Year 2011, which ended on July 31, 2011. Diamond
6 sent the payments to the growers in August of 2011. The payments came up well short of
7 market prices. There were numerous complaints from Diamond's walnut growers about
8 the below-market payments.

9
10 Then, in early September 2011, after the Company's fiscal year closed, Diamond
11 unexpectedly made what it termed a "Momentum Payment" to its growers in the amount
12 of \$50 million, claiming it was a pre-payment for the Fall 2011 crop. However, as
13 reported in the *Wall Street Journal* on December 12, 2011, growers have stated that those
14 unprecedeted Momentum Payments were actually a make-up payment for the price
15 shortfall of the Fall 2010 crop. Mississippi PERS' counsel also has obtained information,
16 through their own investigation, that the September 2011 Momentum Payment actually
17 was attributable to the 2010 crop. As reported by Mark Roberts of the Off Wall Street
18 Consulting Group, Diamond referred to its August payment for the previous year's crop as
19 the "final" payment for the Fall 2009 crop. However, the August 2011 payments were *not*
20 marked as "final." Diamond's own head of field operations also reportedly confirmed that
21 the September 2011 payments were additional payments for the Fall 2010 crop. Finally,
22 Diamond's Momentum Payments were made to growers who had ended their contracts
23 with Diamond and thus would not be selling their Fall 2011 walnut crop to Diamond,
24 undercutting Diamond's public claim that the payments were advances for the 2011 crops.

25
26 The September 2011 Momentum Payments of \$50 million were nothing more than
27
28

1 make-up payments for the underpayments for the Fall 2010 crop, which, under proper
 2 accounting practices, should have been treated as an expense incurred in Diamond's 2010
 3 fiscal year. Had Diamond properly accounted for these payments, its income and earnings
 4 would have been reduced, and the Pringle's acquisition would have been more costly than
 5 the Company reported. By some estimates, Diamond's failure to recognize the
 6 Momentum Payments as an expense in 2010 resulted in an estimated 50% overstatement
 7 of its operating income for that year and an estimated 20% overstatement of its gross
 8 margin. Diamond's overstatement of its income and margins resulted in an artificially
 9 inflated share price. The Company's shares rose from \$78.23 to \$87.30 immediately after
 10 the Company released its Form 10-K, which included the overstatements, on September
 11 15, 2011. The Company's shares continued their climb over the next few days, topping
 12 out at \$92.47 on September 20, 2011. On Tuesday, November 1, 2011, Diamond
 13 announced that the Pringles acquisition, previously announced to close in December 2011,
 14 would be postponed, possibly until mid-2012, in order to allow Diamond to complete an
 15 internal accounting investigation regarding the improper make-up payments. On
 16 November 5, 2011, the *Barron's Online* reported that the internal investigation centered
 17 on the Company's make-up payments to walnut growers and suggested that the Company
 18 may have overstated its fiscal 2011 financial results. These overstated results would date
 19 back to the beginning of the Class Period, December 9, 2010, when Diamond first
 20 reported earnings and expenses for fiscal year 2011.

21 The initial complaint in this action was filed on November 7, 2011. That same
 22 day, the first PSLRA mandated notice of pendency of this action was published.⁹ The
 23 PSLRA permits any member of the purported class to move for appointment as Lead

24 ⁹ This notice is attached as Exhibit C to the Wilson Declaration.

1 Plaintiff within 60 days of the publication of the first notice of the filing of a securities
 2 class action. *See* 15 U.S.C. § 78u-4(a)(3)(A). Movant Mississippi PERS satisfies this
 3 deadline by making this motion.

4 **III. ARGUMENT**

5 **A. The Related Actions Should Be Consolidated for Efficiency**

6 Consolidation pursuant to Rule 42(a) is proper when actions involve common
 7 questions of law and fact. *See Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146,
 8 1150 (N.D. Cal. 1999); *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161,
 9 175 (C.D. Cal. 1976). This Court has broad discretion under Rule 42 to consolidate cases
 10 pending within this district. *See Investors Research Co. v. United States District Court*,
 11 877 F.2d 777 (9th Cir. 1989); *Perez-Funez v. District Dir., Immigration & Naturalization*
 12 *Serv.*, 611 F. Supp. 990, 994 (C.D. Cal. 1984) (“A Court has broad discretion in deciding
 13 whether or not to grant a motion for consolidation, although, typically, consolidation is
 14 favored.”) (citations omitted).

15 Courts have recognized that class action shareholder suits, in particular, are ideally
 16 suited for consolidation pursuant to Rule 42(a) because consolidation of many actions
 17 involving the same parties and issues expedites pretrial and discovery proceedings,
 18 reduces duplication, and minimizes the costs and time expended by all persons involved.
 19 *See Equity Funding*, 416 F. Supp. at 176. Indeed, § 21D(a)(3)(B) of the Exchange Act
 20 contemplates the consolidation of multiple actions “asserting substantially the same claim
 21 or claims.” Moreover “[n]either Rule 42 nor the PSLRA demands that the actions be
 22 identical before they may be consolidated.” *Takeda v. Turbodyne Techs, Inc.*, 67 F. Supp.
 23 2d 1129, 1133 (C.D. Cal. 1999) (consolidating six actions with substantial overlap in
 24 defendants and different class periods).

1 Each of the Related Actions asserts essentially the same class claims brought on
 2 behalf of purchasers of Diamond securities who purchased in reliance on Defendants'
 3 materially false and misleading statements and/or omissions during the Class Period.
 4 Consolidation is appropriate when, as here, there are actions involving common questions
 5 of law or fact. *See* Fed. R. Civ. P. 42(a); *Takeda*, 67 F. Supp. 2d at 1133; *see also*
 6 *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990).

8 Mississippi PERS respectfully submits that the requirements for consolidation are
 9 met here and that the Related Actions should be consolidated and consequently does not
 10 object to this Court's January 3, 2012 Order to Show Cause why the cases should not be
 11 consolidated, together with all cases related to them in the future (other than the derivative
 12 cases).

13 **B. Mississippi PERS Should Be Appointed Lead Plaintiff**

15 Movant Mississippi PERS respectfully submits that it should be appointed Lead
 16 Plaintiff because it is the movant "most capable of adequately representing the interests of
 17 class members." 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA establishes a presumption
 18 that the "most adequate plaintiff" is the movant that "has the largest financial interest in
 19 the relief sought by the class" and "otherwise satisfies the requirements of Rule 23 of the
 20 Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B); *see also In re Cavanaugh*,
 21 306 F.3d 726, 730 (9th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir.
 22 2001); *Lax v. First Merchs. Acceptance Corp.*, No. C 2715, 1997 WL 461036, at *3 (N.D.
 23 Ill. Aug. 11, 1997) (members of moving group with largest collective financial interest
 24 were presumptive lead plaintiffs).

26 **1. Mississippi PERS Believes It Has the Largest Financial Interest
 27 in the Relief Sought by the Class**

28 Movant Mississippi PERS should be appointed Lead Plaintiff because it has the

1 largest financial interest in the relief sought by the Class. 15 U.S.C. § 78u-4(a)(3)(B)(iii).
 2 Courts generally look to four factors (often referred to as the *Lax* analysis) in determining
 3 which movant has the largest financial interest in the litigation. *Richardson v. TVIA, Inc.*,
 4 No. 06-07307, 2007 WL 1129344, at *3 (N.D. Cal. Apr. 16, 2007) (noting courts have
 5 typically considered the “*Olsten-Lax*” factors to determine which lead plaintiff movant has
 6 the largest financial interest). Under the four-factor analysis, courts consider the
 7 following to determine the largest financial interest: “(1) the number of shares purchased
 8 during the class period; (2) the number of net shares purchased during the class period; (3)
 9 the total net funds expended during the class period; and (4) the approximate losses
 10 suffered during the class period.” *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295
 11 (E.D.N.Y. 1998) (citing *Lax*, 1997 WL 461036, at *5). The fourth factor of “*Olsten-Lax*”
 12 analysis, “approximate losses” is generally considered the most important factor.
 13
 14 *Richardson*, 2007 WL 1129344, at *4.

15 Mississippi PERS purchased a total of 57,300 Diamond shares during the Class
 16 Period. Movant sold 2,500 of these shares during the Class Period, and therefore had net
 17 purchases of 54,800 shares. During the Class Period, Mississippi PERS had net
 18 expenditures of \$3,883,357 on these purchases. Mississippi PERS sustained approximate
 19 losses of \$1,819,454 in connection with its investment in Diamond.¹⁰ The magnitude of
 20 Mississippi PERS’ financial interest in this litigation can be summarized in the following
 21 table:
 22

23
 24 ¹⁰ Courts recognize two principal methods for calculating losses for purposes of
 25 appointing a lead plaintiff under the PSLRA. These are the “first in, first out” (“FIFO”)
 26 method and the “last in, first out” (“LIFO”) method. Under the FIFO method, sales are
 27 offset against the movant’s inventory of stock acquisitions, starting with the earliest and
 28 moving chronologically forward. Under the alternative LIFO method, the sales are offset
 against the movant’s inventory of stock acquisitions, starting with the latest and moving
 chronologically backward. Mississippi PERS’ above losses are the same using both
 methods.

	(1) Number of shares purchased during Class Period	(2) Number of net shares purchased during Class Period	(3) Total net funds expended during Class Period	(4) Approximate losses suffered
Mississippi Public Employees' Retirement System	57,300	54,800	3,883,357	\$1,819,454

Based on these factors, Mississippi PERS is the presumptive “most adequate plaintiff” and should be appointed Lead Plaintiff in this action.

2. Mississippi PERS Otherwise Satisfies the Rule 23 Requirements

Mississippi PERS should be appointed Lead Plaintiff because it also satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the proposed class representative. Consequently, typicality and adequacy requirements of Rule 23(a) are the main focus in deciding a motion to appoint lead plaintiff, and examination of the remaining requirements is deferred until class certification. *See Richardson*, 2007 WL 1129344, at *4 (citing *In re Cavanaugh*, 306 F.3d at 730). Here, Mississippi PERS satisfies both requirements.

Mississippi PERS’ claims are typical of the claims of other Class members. Generally, the test of typicality “is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)); *see also Richardson*, 2007 WL 1129344, at *5 (typicality satisfied where the proposed lead plaintiff shared substantially similar questions of law and fact with other members of the class and the claims arose from the same course of conduct by defendants). Mississippi PERS’ claims in this action arise

1 from the very same events and course of conduct as the claims of the other Class members
 2 – *i.e.*, the artificial inflation and consequent market correction of the price of Diamond’s
 3 stock caused by the false and misleading disclosures during the Class Period pursuant to
 4 which Mississippi PERS and its fellow Class members all purchased Diamond’s shares.
 5 Mississippi PERS’ claims are also founded on precisely the same legal theories as the
 6 other class members.

7 Mississippi PERS likewise satisfies the adequacy requirement of Rule 23. Under
 8 Rule 23(a)(4), the representative parties must fairly and adequately protect the interests of
 9 the class. This requirement is met if “there are no conflicts between the representative and
 10 class interests and the representative’s attorneys are qualified, experienced, and generally
 11 able to conduct the litigation.” *Richardson*, 2007 WL 1129344, at *4 (citing Fed. R. Civ.
 12 P. 23(a)(4)); *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Mississippi PERS
 13 is adequate to represent the Class because its interests are perfectly aligned with those of
 14 the other Class members and are not antagonistic in any way. As investors in the
 15 artificially inflated publicly traded securities of Diamond, and having suffered substantial
 16 losses upon the Company’s corrective disclosures, Mississippi PERS has an identity of
 17 interests with its fellow Class members.¹¹ There are no facts suggesting that any actual or
 18 potential conflict of interest or other antagonism exists between the interests of

22 ¹¹ Mississippi PERS has a record of success in serving as a Lead Plaintiff in securities
 23 class actions. For example, Mississippi PERS served as co-lead plaintiff in the Northern
 24 District of California case, *In re Maxim Integrated Products, Inc. Securities Litigation*,
 25 Case No. 08-cv-832 (JW). Mississippi PERS also has served as lead plaintiff in the
 26 following actions: *In re Satyam Computer Services, Ltd, Securities Litigation*, No. 09-
 27 md-2027 (S.D.N.Y.), *In re Royal Bank of Scotland Group plc Securities Litigation*, No.
 28 09-cv-300 (S.D.N.Y.), *Public Employees’ Retirement System of Mississippi v. Goldman
 Sachs Group, Inc., et al.*, No. 09-cv-1110 (S.D.N.Y.), *Hill v. State Street Corporation, et
 al.*, No. 09-cv-12146 (D. Mass.). See Wilson Decl. at Ex. A. Mississippi PERS also
 served as a lead plaintiff in *In re Semtech Corp. Securities Litigation*, No. 07-cv-7114
 (C.D. Cal.), which is not listed on Mississippi PERS’ Certification, however, because it
 was filed prior to the three-year period preceding the date of the Certification. See 15
 U.S.C. § 78u-4(a)(2)(A)(v).

1 Mississippi PERS and other Class members. Mississippi PERS' selection of highly
 2 experienced law firms such as Chitwood and G&E as co-counsel and Lieff Cabraser as
 3 local counsel likewise demonstrates its adequacy to oversee this action as the Lead
 4 Plaintiff.
 5

6 Mississippi PERS also has a financial interest in the outcome of this case sufficient
 7 to ensure vigorous advocacy. *See, e.g. Ruland v. Infosonics Corp.*, No. 06-CV-1231, 2006
 8 WL 3746716, at *6 (S.D. Cal. Oct. 23, 2006) (finding adequate a proposed Lead Plaintiff
 9 that "has [adequate] incentive to prosecute this action vigorously and states that he is
 10 willing to serve as a representative on behalf of the class."); *Ferrari v. Gish*, 225 F.R.D.
 11 599, 607 (C.D. Cal. 2004) (stating movant "has suffered the greatest financial loss,
 12 providing an incentive to prosecute the case vigorously."). As set forth above, Mississippi
 13 PERS suffered substantial losses on its investment in Diamond sufficient to ensure a
 14 commitment to the vigorous prosecution of this lawsuit. Mississippi PERS has likewise
 15 submitted a certification affirming its understanding of the duties owed to Class members
 16 through its commitment to oversee the prosecution of this Class action. *See* Wilson Decl.
 17 at Ex. A. Through this certification, Mississippi PERS accepts its fiduciary obligations it
 18 will assume if appointed Lead Plaintiff in this action. Thus, Mississippi PERS, in addition
 19 to having the largest financial interest, also *prima facie* satisfies the typicality and
 20 adequacy requirements of Rule 23 and, therefore, satisfies all elements of the Exchange
 21 Act's prerequisites for appointment as lead plaintiff in this action.
 22

24 Moreover, the legislative history of the PSLRA demonstrates that Congress
 25 intended to encourage large institutional investors, especially public pension funds, to
 26 serve as lead plaintiff. Courts have recognized that public pension funds, such as
 27 Mississippi PERS, are particularly favored as lead plaintiffs: "The Court also notes that
 28

1 the members of the aptly-named Pension Fund Group are *public institutional investors*,
 2 which comports with *the PSLRA's expressed preference for such lead plaintiffs.*" *In re*
 3 *Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 305-06 (S.D. Ohio 2005) (emphasis
 4 added); *see also Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 639 (D.N.J.
 5 2002) (court appointed public pension fund over investment management company with
 6 larger losses because public pension fund "possesses the financial sophistication and
 7 expertise to ensure that the litigation will proceed in the best interests of the Class");
 8 *Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1051 (N.D. Cal. 2001) ("As an
 9 institutional investor with a large financial stake in the outcome of this litigation, [movant]
 10 'is exactly the type of lead plaintiff envisioned by Congress when it instituted the lead
 11 plaintiff requirements.'") (quoting *Bowman v. Legato Sys.*, 195 F.R.D. 655, 657 (N.D.
 12 Cal. 2000)). As Congress noted in the Statement of Managers of the PSLRA:
 13

14 Institutional investors and other class members with large
 15 amounts at stake will represent the interests of the plaintiff
 16 class more effectively than class members with small
 17 amounts at stake.

18 H.R. REP. NO. 104-369, at 34 (1995) (Conf. Rep.). Similarly, the Senate Report on the
 19 PSLRA states in pertinent part:

20 The Committee believes that increasing the role of
 21 institutional investors in class actions will ultimately benefit
 22 the class and assist the courts.

23 Institutions with large stakes in class actions have much the
 24 same interest as the plaintiff class generally. . . .

25 S. REP. NO. 104-98, at 11 (1995). Furthermore, a public pension fund is "accustomed to
 26 acting in the role of a fiduciary, and its experience with investing and financial matters
 27 will only benefit the class." *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex.
 28 1997). As a public pension fund, Mississippi PERS is the prototypical lead plaintiff under
 the PSLRA because it has a significant interest in seeking financial redress and will

1 represent the interests of the Class effectively by directing and controlling the litigation.

2 **IV. CONCLUSION**

3 For the foregoing reasons, Mississippi PERS respectfully requests that the Court:
4 (i) consolidate for all purposes the Related Actions against Defendants; (ii) appoint
5 Mississippi PERS as Lead Plaintiff pursuant to §21D(a)(3)(B) of the PSLRA; and (iii)
6 grant such other and further relief as the Court may deem just and proper.

7 Dated: January 6, 2012

8 Respectfully submitted,

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